

Supreme Court of the United States

OCTOBER TERM, 1944

No. 443

INTERCOUNTY OPERATING CORPORATION, and
SALONGA FARMS, INC.

Petitioners
(Plaintiffs-Appellants below)

against

THE COUNTY OF NASSAU

Respondent

and

ATLANTIC MUNICIPAL CORPORATION, *et al.*, etc.,
Defendants

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW
YORK AND BRIEF IN SUPPORT THEREOF**

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INTERCOUNTY OPERATING CORPORATION, and
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Petitioners
(Plaintiffs-Appellants below),

against

THE COUNTY OF NASSAU,

Respondents,

and

ATLANTIC MUNICIPAL CORPORATION, *et al.*, etc.,

Defendants.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, above named, respectfully show:

This is a petition for a Writ of Certiorari to review a final decision made June 14th, 1944, by the New York State Court of Appeals, the last resort of all causes of the State of New York, affirming without opinion an order of the Appellate Division of the Supreme Court for the Second Judicial Department, which affirmed with opinion (R. 42-43) an order of the Supreme Court of the State of New York held for the County of Nassau dismissing the Petitioners' complaint with opinion (R. 32-35).

1. Summary Statement of the Matter Involved.

This action for a Declaratory Judgment, pursuant to Section 473 of the New York Civil Practice Act, and Rules 210 to 214, inclusive, of Rules of Civil Practice, Supreme Court, was brought for a declaration of the rights of all parties under Laws of New York, 1941, Chapters 562 and 679 (hereinafter referred to as the Code Amendments, and set out in full in Appendix A), amending Laws of New York, 1939, Chapter 272 (otherwise known as the Nassau County Administrative Code, hereinafter referred to as the Code, the pertinent Sections of which are contained in Appendix B), and for a construction of the said Code Amendments to determine the validity thereof under the Federal Constitution~~d~~ as sought to be applied and put into operation and effect by the Respondent.

Your Petitioners are business corporations, incorporated under the laws of the State of New York, whose chief business consists in making investments in real property, mortgages and tax lien certificates. The Respondent is a municipal corporation, a subdivision of the State of New York. The other Defendants are business corporations or individuals, all tax lien purchasers at the 1941 sale, interested in the outcome of this litigation but who took no part herein.

At sales held by the Respondent on July 14th, 1939, and again on July 10th, 1940, your Petitioners purchased tax lien certificates and invested therein, in the aggregate, approximately \$250,000.00. At the dates of said sales the Code provided that a period of 4 years must elapse between the date of sale of a lien and its maturity. The liens purchased by your Petitioners were subject to the

liens of unpaid taxes for subsequent years, which, if sold in the ordinary course under existing provisions of the Code, would also provide that a period of four years must elapse between the dates of their sales and their maturity. Thus, at the times of their purchases of tax liens, the Petitioners were assured under the existing Code, of valid and subsisting lien certificates for a period of at least 4 years, subject only to a prior defeasance by the payment to them of the monies expended for the certificates, plus the interest and penalties provided.

The Code Amendments, (Appendix A) were enacted, effective April 19th and 22nd, 1941. In July of 1941, the Respondent purchased tax liens covering properties affected by the liens previously sold by Respondent to the Petitioners.

Secure in the belief that their rights under their tax lien certificates and their remedies for the enforcement thereof were not affected by the subsequent sales, your Petitioners did nothing until they were notified by Respondent that its tax lien certificates, purchased subsequent to the enactment of the Code Amendments, matured by virtue of said enactments in 1943, and that it would seek to obtain title to the properties affected thereby. In practical effect, the result sought by the County was to deprive your Petitioners of the benefits of their tax lien certificates, which by their terms under the controlling enactment in effect at the time of Petitioners' purchases could not mature until a later date, and to render them worthless, unless, as permissively provided in the Code, the Petitioners were to pay larger additional amounts for the subsequent taxes and add them to their liens. Under the Code prior to the Code Amendments, no subsequent tax liens for accruing taxes

could mature prior to the 4 year period. The drastic effect upon the Petitioners of the giving effect, in such a manner, to the Code Amendments is summarized by Mr. Justice Johnson (R. 32) in the following words:

“* * * The effect upon the plaintiffs is apparent; Either they must pay large amounts of subsequent taxes sooner than the law required when they purchased their liens, or, by sales for later taxes their liens will be made worthless * * *.”

The abrogation, by subsequent legislation, of Petitioners' rights under valid contracts, made under laws in effect at the time, is explicit in the above quoted language. A federal right is involved.

However, the Legislature, in enacting the amendments, desired to bring them in harmony with the Federal Constitution, and therefore expressly indicated that it did not intend to abrogate the rights of tax lien buyers in any tax liens acquired prior to the effective dates of the Code Amendments.

Section 6 of Chapter 679 of the Laws of 1941 (Appendix A) provides:

“All rights and remedies provided for the enforcement of tax liens and the redemption of real property affected by a tax lien sold at a sale of tax liens held prior to the first day of April, nineteen hundred and forty-one shall continue in respect of such tax liens and such real property in the same manner as though this chapter had not been enacted.”

This action was therefore commenced on July 19th, 1943, by the service of a summons and verified complaint (R. 8-31) upon the Respondent and the simultaneous service of an order to show cause in aid of an application

for an injunction, *pendente lite*, to restrain Respondent, through its Treasurer, from issuing, to itself or any other Defendant, all tax lien buyers at the 1941 sale, any deed to any parcel of real property affected by any unmaturred tax lien certificate owned by either of the Petitioners.

The application for an injunction was denied by the Supreme Court and an appeal from that order was taken to the Appellate Division. There the order of the Court below was affirmed by a vote of 4 to 1. The majority of the Court rendered no opinion, but Presiding Justice Close dissented in a memorandum (*Intercounty v. County of Nassau*, 266 A. D. 969) in which he said that he:

“* * * votes to reverse the order in so far as appealed from and to grant the motion on the ground that the complaint states a cause of action for a declaratory judgment and that the plaintiffs are entitled to an injunction, *pendente lite*.”

No appeal lay from this order to the Court of Appeals.

During the pendency of the above appeal to the Appellate Division, however, the Respondent herein made a motion addressed to the complaint for a dismissal thereof and for judgment on the ground that the same does not state facts sufficient to constitute a cause of action (R. 7).

The Court of first instance dismissed the complaint, holding that the Code Amendments were, in effect, prospective only in part, and in its memorandum (R. 32) referred to the federal question raised by Petitioners in the following words:

“* * * First, it is suggested rather than urged that the amendment of the Tax Act is unconstitu-

tional as impairing the obligation of the Contract * * *."

An appeal was thereupon taken by your Petitioners to the Appellate Division of the Supreme Court. There the lower Court's judgment was affirmed. The Appellate Division in its memorandum (R. 42, 43) does not in specific words refer to the issue involving the federal question raised below, but does say that (R. 43):

"The Legislature had an untrammelled right to enact the legislation under review."

In affirming the lower Court's judgment, however, the Appellate Division granted Petitioners' motion for leave to appeal to the Court of Appeals certifying "that in its opinion questions of law are involved which ought to be reviewed" (R. 40).

In a separate memorandum, Close, P. J., concurred in the result, i.e., the allowance of an appeal to the Court of Appeals, but said that he was "* * *" adhering however to this position as stated in *Intercounty Operating Corp. v. County of Nassau* (266 App. Div. 969)." (R. 43.)

Throughout the appeal in the Appellate Division from the judgment of dismissal of your Petitioners' complaint, they have urged that the practical effect and operation given to the legislation under review as construed and applied by the lower Court rendered the legislation in conflict with the contract clause of the Federal Constitution and gave it effect so as to impair your Petitioners' rights under their contracts with the Respondent.

This position was taken and this point was urged on their appeal to the Court of Appeals. The judgment

of the Appellate Division was affirmed by the Court of Appeals without opinion. It is from this decision of the Court of Appeals that Petitioners come praying for a Writ of Certiorari.

2. Jurisdiction.

The date of the decision of the Court of Appeals of the State of New York of which review is here sought, is June 14th, 1944 (R. Frontispiece) and the final decree of that Court was filed June 26, 1944 (R. 44).

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 (b) of the Judicial Code, as amended by the Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54, 28 U. S. C. A., Section 344 (b).

There are here involved Laws of New York, 1941, Chapters 562 and 679, amending Laws of New York, 1939, Chapter 272, and the Court of Appeals of the State of New York decided against Petitioners' rights thereunder upon their practical effect and operation, as construed and applied, so as to produce an impairment of the Petitioners' contracts repugnant to Article 1, Section 10 of the Constitution of the United States. The statutes involved are set forth at length in the Appendix.

The federal question was raised by the pleadings (R. 21, 22 and 24).

Where, as here, all the parties are before the Court in an action for a declaratory judgment, seeking a determination of their legal rights upon the facts alleged in the complaint, the relief sought is a definitive adjudication of the disputed constitutional rights of the Appellants, and the issues thus raised and judicially de-

terminated constitute a case or controversy for the review of which this Court has jurisdiction.

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States.

Detroit United Ry. v. Detroit, 242 U. S. 238;
Nashville C. & St. L. R. Co. v. Wallace, 288 U. S.
 249.

3. Reasons for Issuance of Writ.

This case presents questions of the first importance relating to the practical effect and operation of Acts of the State Legislature as construed and applied so as to produce impairment of contracts involving substantial sums. This was the first time this question was presented to the State Court of Appeals and if this Court grants certiorari, it will be the first time that this Court will consider the application of the Statutes to this set of facts.

Aside from the novelty and importance of the issues presented, the decision of the Court of Appeals should be reviewed for the additional reason, we submit, that it is clearly erroneous and not in accord with the principles of applicable decisions of this Court.

In so far as the decision interprets subsequent legislation so as to impair rights under existing contracts, it is not in accord with the decisions of this Court in the following cases, among others:

Walker v. Whitehead, 83 U. S. 357;
Bradley v. Lightcap, 95 U. S. 1;
Wood v. Lovett, 313 U. S. 362.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of New York, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and of the proceedings of the said Court of Appeals, and that the order and judgment of the Court of Appeals of the State of New York be reversed by this Honorable Court, and that your Petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, New York, August 22nd, 1944.

INTERCOUNTY OPERATING CORPORATION
and
SALONGA FARMS, INC.,
Petitioners,

By HARRY MESARD,
Counsel for Petitioners.